In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-679

UNITED STATES OF AMERICA, PETITIONER

v.

STOECO HOMES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Involved here is a "finger canal" development, characteristic of many that have been proposed or constructed along the coastal and inland waterways of New Jersey and Delaware and other coastal states. Whether the developers of these communities are required to obtain federal permits[1] before dredging navigable lagoons that connect with the adjacent navigable waterways is, as we stressed in our petition, a question of considerable importance. For if the decision below stands, federal protection of these navigable waterways will seriously diminish.

Respondent, in its brief in opposition, does not actually dispute the significance of the issue we bring to the Court. Rather, respondent suggests that in light of the facts and

[1]Under Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403.

circumstances of this particular case, the court of appeals decided it correctly by holding that no federal permit was required under Section 10 of the 1899 Rivers and Harbors Act. While admitting that it did not apply for a federal permit when it began excavating the lagoons,[2] respondent argues that regardless of the scope of Section 10, regulations and practices of the Army Corps of Engineers at the time (1965) did not require a permit because the excavations were shoreward of various bulkheads (Brief in Opp. 4-5).

But such permits were required then (and are required now) and respondent was not misled into believing the contrary. Rejecting respondent's contention that it had been misled, the district court found (Pet. App. 32A):

> Contrary to defendant's unpersuasive assertions that the ACOE's actions and communications over the course of the last 24 years misled it into believing that it was not required to secure a permit for its operations in Plan Six, the testimony regarding these assertions plainly demonstrates that defendant was aware of this requirement as early as 1949, and that it most certainly knew, at the commencement of its activities in the Southwest Sector, that it needed a permit to develop Plan Six. Nonetheless, it never completed an application for, nor did it ever receive, an appropriate permit to work in this area.

The district court also found that (*id.* at 33A):

> The federal government has not established harbor lines in the Back Thorofare Area [the area in question] nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. * * *

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[2]Brief in Opp. 4: "Stoeco does not deny that it entered upon the excavation of South Harbor and the lagoons radiating from it without applying to the Army Corps of Engineers for a permit, or obtaining a permit from the Secretary of the Army."

Although expressing some doubt about the trial court's findings in this regard,[3] the court of appeals nevertheless assumed them to be correct and rested its decision on the broader ground that Section 10 of the Rivers and Harbors Act does not apply to excavation on fast land even though those excavations join and become part of the navigable waters of the United States. As we argued in our petition, however, such excavations "'alter or modify the course, location, condition or capacity' * * * of the navigable waters to which they connect, through (among other things) washouts, deposits and changes in traffic" (Pet. 6-7).

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[3]The court of appeals discussed whether a regulation in effect before 1970 (33 C.F.R. (1962 ed.) 209.150) allowed excavation shoreward of existing "harbor lines" without a permit (Pet. App. 9A-10A). Although there were no federally-established harbor lines in existence with respect to the area involved here, the court below thought the regulation might apply in any event because it "appears to refer to actual harbor lines established by any authority" and here respondent's excavation were shoreward of "some harbor lines" (*id.* at 9A).

However, contrary to the court of appeals' suggestion, the regulations referred only to federally-established harbor lines and excavations seaward of such lines. The first subsection of the regulation (33 C.F.R. (1962 ed.) 209.150(a)(1)) spoke of the "harbor lines to be established" by the Secretary of the Army and a later subsection (Section 209.150(g)) authorized the modification of any "harbor line" only in accordance with federally-established procedures.

Moreover, if there had been a federal harbor line in existence, this line, in the words of the regulation then in effect,

> does not imply consent to operations of every kind landward of the line. Such work as dredging for instance may seriously interfere with the regimen of the waterway and will ordinarily require the authorization of the Department to insure that operations are conducted under proper restrictions.

33 C.F.R. (1962 ed.) 209.390, subsequently renumbered 33 C.F.R. 209.150(i)(1), revoked May 27, 1970. The current regulation, 33 C.F.R. (1974 ed.) 209.150(b), was promulgated May 27, 1970, and is even more explicit. (Much of the dredging and filling at issue here began "sometime after March 1971" (Pet. App. 27a).)

It is no answer to say, as respondent does (Brief in Opp. 6), that its excavations only increased and did not obstruct the navigable capacity of the harbor in question. The first sentence of Section 10 prohibits any obstruction to navigable water without the affirmative authorization of Congress. But the remainder of Section 10 makes it unlawful "* * * to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * *" of such waters without the approval of the Corps of Engineers. Regardless of whether the alteration would increase or decrease the navigable capacity—or whether the result of the alteration is or is not desirable—a federal permit must be obtained. Otherwise the decision is solely in the hands of the developers whose desires do not always coincide with the public interest that should be taken into account when navigable waters (and the traffic patterns on them) are affected. Thus, whether developers may make such inland alterations to navigable waterways as they choose, without the consent of Congress or the Corps of Engineers, is at the heart of this case and that, we submit, is an issue worthy of this Court's consideration. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
CARL STRASS,
THOMAS C. LEE,
Attorneys.

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